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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 458

TODD SHIPYARDS CORPORATION,
Petitioner, Appellant Below,

vs.

HARVEY DE GRAW,
Respondent, Appellee Below

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

1. This is a petition for a writ of certiorari to review the judgment of the New Jersey Court of Errors and Appeals dated June 5, 1946, affirming the judgment of the Supreme Court of New Jersey (Order for Affirmance and Remittitur, R. f) dismissing a writ of certiorari to said New Jersey Supreme Court (Writ of Certiorari, R. 1) and affirming the judgment of the Hudson County Court of Common Pleas (Judgment, R. 22) which had decided on appeal from the Workmen's Compensation Bureau that the Workmen's Compensation Bureau of the Department of

Labor of the State of New Jersey had jurisdiction to hear and determine this case on the sole question presented, and contrary to the defenses interposed, motions made and exceptions taken by the petitioner to the effect that the Courts of the State of New Jersey were without jurisdiction in the matter and that same was cognizable under the Federal Statute in such case made and provided (33 U. S. C. A. 901 *et seq.*) and the provisions thereof, also known as the Longshoremen's and Harbor Worker's Compensation Act.

2. A certified transcript of the record in the case including the proceedings in the New Jersey Court of Errors and Appeals is furnished herewith in compliance with the Rules of this Honorable Court.

I

Summary Statement of the Matter Involved

1. Petitioner, a corporation of the State of New York, authorized to do business in the State of New Jersey is engaged in the repair of ships in the City of Hoboken, County of Hudson of said State bordering on the navigable waters of the Hudson River. Harvey DeGraw engaged as a marine pipefitter by the petitioner brought an action in the Workmen's Compensation Bureau of the Department of Labor of the State of New Jersey alleging an injury arising out of and during the course of his employment with your petitioner while working on board a freight ship which was afloat in said Hudson River and being converted into a naval troopship. The defense in the answer thereto, set forth that said Department of Labor of the State of New Jersey was without jurisdiction and that same was solely within the jurisdiction of the Federal Statute known as the Longshoremen's and Harbor Worker's Compensation Act (33 U. S. C. A. 901 *et seq.*). At the trial

of the issue in the State Bureau, the Petitioner moved to dismiss on the ground of lack of jurisdiction in the State Courts both at the close of the claimant's case and again at the end of the trial, both of which motions were denied and were followed by a judgment determining that claimant's work was purely local and not maritime in nature and within the purview of the Workmen's Compensation Laws of the State of New Jersey.

2. The petitioner appealed from this judgment to the Hudson County Court of Common Pleas of said State of New Jersey on the sole question of lack of jurisdiction of the Courts of said State and that same was solely a question for Federal Jurisdiction and upon oral argument and briefs said judgment below was affirmed; application was then made to the New Jersey Supreme Court for Writ of Certiorari and on similar presentation of oral argument and briefs on the sole question of jurisdiction, said Writ was dismissed and the matter was held within the purview of the Workmen's Compensation Act of the State of New Jersey.

3. Appeal therefrom was taken by your petitioner to said New Jersey Court of Errors and Appeals in the last resort in all causes and after oral argument and submission of briefs, said Court of Errors and Appeals affirmed the decision of the Courts below and in so doing passed judgment upon, and gave decision in, a question solely Federal in nature and therefore without its jurisdiction.

II. Questions Presented

The questions presented are:

1. Whether the Workmen's Compensation Law of New Jersey is applicable to an injury on board ship or whether jurisdiction is exclusively in the Federal Courts under the

Maritime Law of the United States by virtue of Article III, section 2 of the United States Constitution.

2. Whether the rights and liabilities of the respective parties are within the purview of the Federal Longshoreman's or Harbormen's Act, Title 33 U. S. C. A. 901 *et seq.* or under the New Jersey Compensation Act, N. J. R. S. 34: 15-1 *et seq.*

3. Whether repairs involving the conversion of a commissioned freighter from one maritime use to another (U. S. Naval use) make a contract pertaining thereto one of original construction instead of repair and therefore, out of the jurisdiction of the Federal Courts under the maritime law or under the Federal Longshoremen's and Harbormen's Act.

III. Statement of the Case

On January 20th, 1944, Todd Shipyards Co. was engaged in the business of repairing and converting ships for naval use in its shipyard in Hoboken, N. J. On that date Harvey DeGraw employed by Todd Shipyards Co. as a marine pipefitter received a minor injury while at work on the S. S. Fred Morris. Todd Shipyards was not engaged in any original construction of ships (R. 95). The Todd Shipyard is located on the Hudson River—navigable waters of the United States. All of the Todd Shipyards contracts are strictly maritime in nature, having to do with the repair and alteration or conversion of commissioned ships owned by third parties. The contracts of employment are all specialized, as for example, in this case a marine pipefitter, and are all in the furtherance of the specialized corporate purpose which as stated is maritime in nature; that is, the repair and alteration or conversion of commissioned vessels or ships. The performance of the contract of

employment takes place on ships or vessels which are afloat in the navigable waters of the Hudson River (R. 68). The S. S. Fred Morris, a commissioned vessel was owned and operated by Lykes Bros. (R. 88, 89). The S. S. Fred Morris came to the Todd Shipyards under its own power where it was drydocked for the purpose of a hull survey, to determine whether she could be converted from a freighter to an attack transport for the United States Navy. The survey was made by the War Shipping Administration, United States Navy and the Todd Shipyard Corporation, all of whom were unrelated units to each other. The War Shipping Administration came into being in 1941 as an Emergency Shipping Agency and as an adjunct of the United States Maritime Service. This same Administration handled merchant cargo vessels. It had nothing to do with war ships. The S. S. Fred Morris was under the supervision of this Agency. The ship was only drydocked for a short time within which time the hull survey was made (R. 90), and thereafter at all times while in the shipyard remained berthed (R. 102) and afloat in the Hudson River, moored to the dock. DeGraw was employed for the purpose of this conversion according to plans and specifications and the work he was doing at the time of his injury was in furtherance of same (R. 99 & 100). There were no changes made to the motors or propulsion machinery, the vessel was capable of getting out of the yard on twenty-four hours notice which was fueling time (R. 104). Some pipe and oil lines had to be changed (R. 105), to give the ship greater cruising range and greater oil carrying capacity (R. 110, 111), but none of this was done with reference to any pipe lines to the main engine. The fact is there was no repair work or conditioning done to any of the motors of this vessel. The hull was at no time opened, but merely reinforced by use of additional doublers

(R. 111); no part of the ship or hull was torn down in any way with relation to this reinforcement of the hull (R. 112). Aside from living accommodations for men with attendant facilities (R. 112) there were no other internal changes. The three different navigation and steering mechanisms were intact at all times and unchanged. When the ship was torn down to its greatest degree it could have been operated under its own power by the mere addition of fuel oil which had been removed in accordance with safety rules of the U. S. Coast Guard (R. 114, 115 and 118). When the reconversion was complete the physical layout of the vessel remained unchanged, same horsepower, same length and same size (R. 112), in other words, at no time did she ever lose her identity as a complete vessel. When the work on the S. S. Fred Morris was complete the ship left under her own power and under her own steam and operated by her owner's crew (R. 94), that is to say, she came into the shipyard as a private vessel commissioned for sea duty and left the Todd Shipyards in the same way.

IV. Constitutional Provisions and Statutes Involved

LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT

Title 33, U. S. C. A. 901 *et seq.*, Section 3(a).

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *"

Title 33, U. S. C. A. 901, *et seq.*, Section 4(a).

> "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8 and 9. • • • "

Title 33, U. S. C. A. 901 *et seq.*, Section 5.

> "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband, or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. • • • "

United States Constitution (Article 1, Section 8):

> The Congress shall have power: • • •
> To regulate commerce with foreign nations, and among the several States and with the Indian Tribes;

United States Constitution, Article 3, Section 2:

> The Judicial Power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority; to all cases of admiralty and maritime jurisdiction;

Title 28, U. S. C. A. Section 13 (Judicial Code, Section 9)—Courts open as Courts of Admiralty and equity.

> The district courts, as courts of admiralty, and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning

mesne and final process and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge, may upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office, and in vacation as well as in terms, all such process, commissions, orders and other proceedings whenever the same are not grantable of course, according to the rules and practice of the Court (R. S. 574, March 3, 1911, C 231 9, 36 Stat. 1088).

Title 28 U. S. C. A. Section 41. (Judicial Code, Section 24, as amended).

The District Courts shall have original jurisdiction as follows: • • •

(3) Admiralty causes, seizures and prizes. Third of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law is competent to give it and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel then rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive • • •

New Jersey Workman's Compensation Act, N. J. R. S. 34:15-1 *et seq.*

Section 7

When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of this article compensation for personal injuries to, or for the death of, such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34:15-12 and 34:15-13

of this title in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of the proof of such fact shall be upon the employer.

Section 8

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

Section 9

Every contract of hiring made subsequent to the fourth day of July, one thousand nine hundred and eleven, shall be presumed to have been made with reference to the provisions of this article, and unless there be as a part of such contract an express statement in writing prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of this article are not intended to apply, then it shall be presumed that the parties have accepted the provisions of this article and have agreed to be bound thereby * * *

V. Reasons for Allowing the Writ

1. The New Jersey Court of Errors and Appeals decided the rights and liabilities of the respective parties were not to be governed by the Maritime Law of the United States pursuant to Article 3, Section 2 of the United States Constitution. The decision is in conflict with the decision of this Honorable Court in the case of: *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Spencer Kellogg & Sons Inc.* v. *Hicks,* 275 U. S. 502; *Great Lakes Engineering Co.* v. *Kierejewski,*

261 U. S. 479; *Robbins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449; *John Baisley Iron Works* v. *Span,* 281 U. S. 222, and other representative cases and authorities cited in the argument which hold to the contrary.

2. The New Jersey Court of Errors and Appeals decided the rights and liabilities of the respective parties were not within the purview of the Federal Longshoremen's and Harbormen's Act. The decision of the Court of Errors and Appeals conflicts with the decision of this Honorable Court in the case of: *Baisley Iron Works* v. *Span,* 281 U. S. 222; *Parker* v. *Motor Body Sales,* 314 U. S. 244; *Gonsalves* v. *Morse Dry Dock,* 226 U. S. 171, and other representative cases and authorities cited in the argument which hold to the contrary.

3. The New Jersey Court of Errors and Appeals decided that repairs involving the conversion of a commissioned freighter from one maritime use to another made the work involved therein work of original construction instead of repair and therefore out of the jurisdiction of the Federal Court under the Maritime Law or under the Federal Longshoremen's and Harbormen's Act. The decision of the Court of Errors and Appeals conflicts with the decision of this Honorable Court in the case of: *New Bedford Drydock Co.* v. *Purdy,* 258 U. S. 96, and other representative cases and authorities cited in the argument which hold to the contrary.

WHEREFORE your petitioner prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the New Jersey Court of Errors and Appeals, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case entitled on

this docket, "No. 32, February Term, 1946. *Harvey DeGraw, Defendant-Respondent,* v. *Todd Shipyards Co., Prosecutor-Appellant.* On appeal from the New Jersey Supreme Court", and that the said judgment of the said New Jersey Court of Errors and Appeals may be reviewed, determined and reversed by this Honorable Court, as provided for by the Statutes of the United States and for such other further relief as to this Court may seem proper.

TODD SHIPYARDS CORP.,
WALTER H. JONES,
Attorney for and of Counsel with Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 458

TODD SHIPYARDS CORPORATION,
Petitioner, Appellant Below,

vs.

HARVEY DE GRAW,
Respondent, Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The Opinion of the New Jersey Court of Errors and Appeals (R., last pg), is reported in 47 Atl. 2nd, pg. 338. The Opinion of the Supreme Court of New Jersey (R. d) is reported in 44 Atl. 2nd 513, 133 N. J. L. 402. The Opinion of the Court of Common Pleas of New Jersey, Hudson County (R. 22) is reported in 43 Atl. 2nd, 879, 23 N. J. Misc. 298. The Opinion of the Workmen's Compensation Bureau of the New Jersey Department of Labor (R. 13) is not reported.

II

Jurisdiction

(a) The jurisdiction of this Court is invoked under Title 28, United States Code Annotated, Section 350.

(b) The revised rules of this Honorable Court promulgated in accordance therewith.

(c) The judgment of the New Jersey Court of Errors and Appeals which petitioner seeks to have reviewed was dated May 20th, 1946 and actually filed and entered on June 5th, 1946.

III

Statement of the Case

A sufficiently full statement of the case has been given in the Petition under Titles I and III, and, in the interest of brevity is not repeated here.

ARGUMENT

Point I

Jurisdiction is exclusive in the Federal Courts under the Maritime Law of the United States by virtue of Article III, Section II of the United States Constitution.

The New Jersey Court of Errors and Appeals in denying the Federal jurisdiction speaking of the repairs on the ship in the instant case said:

> "From this recital, it is apparent that the work being done was far more than is comprehended within the term of repairs, but was a conversion, which, when completed, would change the character of the vessel. Furthermore the work that was being performed by

DeGraw consisted in removing a section of a pipe line. This work had no direct relation either to navigation or commerce, and brings this case clearly within the line of cases exemplified by *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469 and *Sultan Railway and Timber Co.* v. *Department of Labor*, 277 U. S. 135."

* * *

There are no provisions in the New Jersey Workmen's Compensation Act relating to maritime or other special classes of workers. The Act provides for elective compensation on an express or implied basis on all contracts of hire. See N. J. R. S. 34:15-7-8-9.

The Hudson River is a navigable water within the jurisdiction of the admiralty courts. The petitioner's slip as far as it is used in maritime work and maritime transactions therein, are subject to maritime law. *The Robert W. Parsons*, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73; *North Pacific Steamship Co.* v. *Hall Bros. Marine Railway & Shipbuilding Co.*, 249 U. S. 119, 30 S. Ct. 221, 63 L. Ed. 510; *O'Hara's* case, 248 Mass. 31, 142 N. E. 844; *Danielsen* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 439, 139 N. E. 567.

The construction of a new vessel is a non-maritime contract. The repair of a once completed ship is a maritime contract. *Edwards* v. *Elliott*, 88 U. S. (21 Wall.) 532, 22 L. Ed. 487; *Thames Towboat Co.* v. *The Francis McDonald*, 254 U. S. 243, 41 S. Ct. 65, 65 L. Ed. 245; *Globe Iron Works* v. *Steamer*, 100 Mich. 583, 59 N. W. 247, 43 Am. St. Rep. 423; *Danielsen* v. *Morse Dry Dock & Repair Co.*, 235 N. Y. 439, 139 N. E. 567; *March* v. *Vulckin Works*, 102 N. J. L. 337; *Davey* v. *D. L. & W. R. R. Co.*, 105 N. J. L. 178; *Rogisch* v. *Union Dry Dock and Repair Co.*, 106 N. J. L. 591.

The work being done on the S. S. Fred Morris was repairing, not constructing. *New Bedford Dry Dock Co.* v. *Purdy*, 258 U. S. 96, 42 S. Ct. 243, 66 L. Ed. 482, and note.

At page 100, of that opinion, Justice McReynolds adopted the language of another opinion previously rendered as follows:

> "And generally, it may be held as a principle, that, where the keel, stem, sternposts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt and not a new vessel. Indeed, without regard to the particular parts reused; if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt and not a new vessel."

The *Purdy* case involved the conversion of a carfloat without motive power and steering gear into a steamer, and it was held that the contract for such work was not one of construction but was a mere repair. The footnote, on page 2 of the Purdy opinion refers to "The Harvard" 270 Fed. 668, wherein it was held that a contract covering work and materials while a vessel was afloat in repair, altering, enlarging and improving her carrying capacity, in order to fit her for a new service, is of a maritime nature, etc. The footnote following the above cites "The Iris," 100 Fed. 104, holding that labor and materials necessary to adapt a sea-going steamer for a trade for which she had not originally been designed, are for repairs and not for construction, and are maritime contracts within the admiralty jurisdiction.

The *Purdy* case was followed in *The Pinthis* (Cir. Ct. Appeals, 3rd Cir.), 286 F. 124, wherein the Court held that The Pinthis, when launched, became a vessel and as such was a subject of maritime jurisdiction. The Court, at page 124, stated:

> "Indeed it will be apparent that if we depart from the certainty of making a completed vessel the stand-

> ard and enter the field of extras, spare parts, incidental equipment and say that such things complete the vessel, we are giving up certainty of the standard of completion for the standard of mere speculation. * * * An automobile is completed when it workably moves out of the shop by its own power and equipment. Prudence and foresight suggest it be equipped with extra tubes and tires; but, when the machine is equipped with such extra tires they are not the factors of original construction, but of anticipated and prudent reserve. So viewing the extra engine parts furnished in this case we are of the opinion the Court below, rightly held they were not elements of original construction."

It has been held that a barge, having no motor power of its own, is a vessel within the meaning of the Longshoremen's Act, since it is a means of transportation. (*Norton* v. *Warner Co.*, 321 U. S. 565, 88 L. Ed. 935.)

In *Massman Construction Company* v. *Bassett*, 30 Fed. Supp. 813, at page 815, the Court said:

> "* * * The term 'vessel' is used in its maritime sense as comprehending any sort of craft capable of being used as a means of transportation on water. The management of the vessel, the loading of same, the care of its equipment and cargo, the performance of any task essential to enable it to accomplish its purpose upon navigable waters are within the term 'maritime employment.'"

As long as a vessel preserves her identity, any work done in the way of alterations, enlargement or improvement, falls under the head of repairs—28 Cyc. 764, *Hughes, Admiralty*, 2nd Ed. 109; *The Susquehanna*, 267 Fed. 811; *The Iris*, 100 Fed. 104; *The Harvard*, 270 Fed. 668; *Ely* v. *Murray & T. Co.*, 200 Fed. 368; *The Convoy*, 257 Fed. 843; *Homer* v. *The Lady of the Ocean*, 70 Me. 350; *Donnell* v. *The Starlight*, 103 Mass. 227; *Good Year Shoe Machinery Co.* v. *Jackson*,

112 Fed. 146; *Covington* v. *Bullock*, 126 Ky. 236, 103 S. W. 276; *American Bonding Co.* v. *Ottumiva*, 137 Fed. 572.

The Mountaineer-Maine Hardware Co. v. *Halfhill Packing Corp., et al.* (Cir. Ct. Appeals, 9th Cir.—1923), 286 F. 914, is to the same effect.

In *American Shipbuilding & Dock Corp. et al.* v. *Rourke & Sons* (Cir. Ct. Appeals, 5th Cir.—1925), a concrete barge which had been built and launched but had never been engaged in commerce, being refitted with loading and unloading apparatus, was held to be a completed vessel and within admiralty jurisdiction.

In *The Showboat* (District of Massachusetts—1930), 47 F. 2nd 286, a five-masted schooner tied to a wharf and used for a restaurant and dancing, but equipped for sailing and being towed, was held a "vessel" within admiralty jurisdiction. The Court on page 287 said:

> "Her mooring lines and chains can be readily cast off; and the electric wires are so fitted as to be easily attachable. • • • She was still a vessel within the admiralty jurisdiction."

A case very analogous to the case at bar, but in which the repairs and conversion were made to a far greater extent, is *Lake Washington Shipyards, et al.* v. *Brueggeman, et al.* (Dist. Ct., W. D. Washington, N. D.—1931), 56 F. 2nd 656, in which case the defendant employer contracted to adapt the passenger steel steamship Iroquois to the additional use of vehicle transportation. To such end as the principal object, the ship was placed on ways to the main deck, stripped of housings, the deck torn out, and the interior "guttered" to within 20.25 feet of the keel; part of the hull plating below water line removed to the extent of a belt 6 to 10 feet above the keel, of some width but not to the top of the hull or rail and full length of the vessel; some ribs were removed to broaden the beam to conform

to requirements for auto transport. Engines and boilers rebuilt and a "new hull put around her"; and all, upon the original "skeleton" over or upon which the vessel was thus remodeled or rebuilt. She was then launched, and the employee was caulking her when fatally injured. The Court at page 656 said:

> "In these circumstances the enterprise was not original construction and non-maritime as plaintiffs contend, but was a remodeling and rebuilding an existing vessel which never lost its identity, and maritime within the rule of the New Bedford case, 258 U. S. 98, 42 S. Ct. 243, 66 L. Ed. 482 * * *."

The case of *Hillcone S. S. Co. et al.* v. *Steffen* (Cir. Ct. of Appeals, 9th Cir.—1943), 136 F. 2nd 965, wherein during the month of February, 1937, and for about two years before, Steffen was employed as a watchman by the Santa Cruz Oil Company on board the S. S. Prentiss which lay in navigable waters at Long Beach, California, tied to a dock. During said time the vessel did not go to sea or engage in any commerce or navigation and there was no crew on board her. She was "indefinitely laid up." The vessel had been purchased by the oil company with the intention of reconditioning and remodeling her. In February 1937, as Steffen was leaving the vessel he sustained injuries to his back by the slipping of a ladder extending from a pontoon to the ship. The Court in remanding the matter back to the Deputy Commissioner who had rejected same, to determine all questions save that of jurisdiction said:

> "Appellate's services were no less maritime in character because performed on a vessel that was out of commission for an indefinite period of time. We may assume the non-maritime character of work on board a hulk permanently laid up and intended to be scrapped or which has been put to some purely non-navigable use. But the Prentiss was intended to be reconditioned

and put back into service on the high seas. She was a ship in every sense of the term, hence was clearly a subject of admiralty jurisdiction. If it be assumed that the case lies in that shadowy area within which at some undefined and undefinable point, state laws can validly provide compensation. Davis *v.* Department of Labor. 317 U. S. 249, 253, 63 S. Ct. 225, 227, 87 L. Ed. Nevertheless the Deputy Commissioner should have accepted jurisdiction."

In *LaCass* v. *Great Lakes Engineering Co.*, 219 N. W. 730 the Supreme Court of Michigan decided that where a ship was being "rebuilt" viz: engine, spar, and smoke-stack removal, and "general repairs", the Federal jurisdiction was exclusive and the State Compensation Act did not apply. The Court said at pages 733 and 734.

> "It is, of course, the purpose of repairs to enable the ship to again ply the waters and carry passengers or freight. The authorities cited are uniform in holding that the repair of a vessel has a direct relation to commerce and navigation and is not a local matter. The same rule is not applied to ships under construction, although their ultimate purpose is water carriage, because, theoretically, a ship is constructed on land, and, until completion, it does not become an instrumentality of commerce. A completed ship, once in commission, has taken and retains a definite status as a means of navigation and commerce. Nor have the courts intimated a distinction between the repair of a vessel, withdrawn from service for extensive overhauling, and of one under charter, en route, in actual commission or being fitted for a specific voyage. And counsel have not suggested in what manner the distinction may be made or limited without imperiling the harmony and uniformity of the maritime law in its international or interstate relations. In the absence of an act of Congress to the contrary, the plain pronouncements that the repair of a completed ship is a

> maritime contract and has a direct relation to commerce and navigation must govern."

A reading of this case will reveal that the repairs or changes to the ship were greater in scope and content than in the instant case.

It is clear that a well defined conflict exists between the decision and the instant case, and the decision of this court, and it is respectfully submitted that there is a serious constitutional question here involved, that is of such importance that it should be decided by this court.

The authorities upon the application of state Workmen's Compensation Acts to injuries sustained on navigable waters are numerous, but they all revolve around a few outstanding federal cases.

The basic case is *Southern Pacific Co.* v. *Jensen*, 244 U. S. 207, 37 S. Ct. 529, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, in which the Supreme Court of the United States held that maritime jurisdiction was exclusive in a situation where a workman operating a truck in the unloading of a steamship moored to a pier some feet away, was injured while on the gangway extending from the ship to the dock, because:

> "The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction."

The constitutional admiralty jurisdiction over such transactions is so far exclusive as not only to prohibit the application of state Workmen's Compensation Laws to them, but also to restrain Congress from extending such state laws to jurisdiction therein. *Knickerbocker Ice Co.* v. *Stewart*,

253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, in which the court said:

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."

The rule of the *Knickerbocker Ice Co.* case was reasserted by the United States Supreme Court in the case of *Spencer Kellogg & Sons, Inc.* v. *Hicks, et als.*, 285 U. S. 502. This case involved review of the New Jersey Compensation Act and the Court held that the New Jersey Act cannot be a method of recovery where admiralty jurisdiction exists. A few quotations from this case will be convincing. At page 515, Justice Roberts holds:

> "The workmen's compensation law of New Jersey, the purpose of which was to supersede the common law redress in tort cases and statutory rights consequent upon death by wrongful act, and to substitute a commuted compensation for injury or death of an employee, irrespective of fault, is not applicable to the injuries and deaths under consideration. . . .
>
> "The decisions hold that the remedy which the compensation statute attempts to give is of a character

wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction to the Courts of the United States of all civil cases of admiralty and maritime jurisdiction. . . . (Cases quoted including the well known case first establishing this principle, viz.: Southern Pac. Co. *v.* Jensen, 244 U. S. 205) and continuing:

> None of the employees of the personal representatives here concerned could have proceeded in admiralty to enforce the workmen's compensation law of New Jersey. That law has not been recognized and taken up as part of the admiralty jurisprudence of the United States.
>
> The compensation act is inapplicable to such a maritime tort, and the injured person is entitled to his remedy under rules recognized in admiralty. • • • And finally this remedy (under the New Jersey compensation act) is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851, etc."

For prior affirmance of the same rule, see *State of Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646.

An exception to the doctrine of the *Jensen* case is noted in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008, where it was held that the Workmen's Compensation Law of Oregon (Or. L. Sec. 6605 *et seq.*) was applicable to an injury sustained by Rohde while on the ship, building a bulkhead in a partially completed vessel then under construction, the vessel lying at a dock in navigable waters. The conclusions of the court may be best expressed in its own words:

> "The contract for constructing The Ahala was nonmaritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his

activities at the time had any direct relation to navigation, or commerce. * * * The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. Union Fish Co. *v.* Erickson, 248 U. S. 308 (39 S. Ct. 112, 63 L. Ed. 261). Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. * * *

"The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled. * * *

"In Western Fuel Co. *v.* Garcia, supra (257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210), we recently pointed out that, as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle."

The court distinguishes the *Jensen* and other like cases:

"In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

And held that, while "the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state," yet in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist.

In *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, the doctrine of the *Grant Smith-Porter* case was applied to a maritime employment and the exception was clarified. The employee was a diver, engaged in working off a barge anchored in navigable waters, removing the timbers of an abandoned set of ways, once used for launching ships. While the facts showed a maritime tort, both from locality and character of the work, the court held the Texas Compensation Law (Vernon's Ann. Civ. St. 1925, arts. 8306-8309) applicable because:

> "The matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

The court, however, confined the operation of the state law to the exception declared and maintained the integrity of its doctrine by citing distinguishing cases:

> "We had occasion to consider matters which were not of mere local concern because of their special relation to commerce and navigation, and held them beyond the regulatory power of the state, in Great Lakes Dredge & Dock Co. *v.* Kierejewski, 261 U. S. 479 (43 S. Ct. 418, 67 L. Ed. 756); Washington *v.* Dawson & Co., 264 U. S. 219 (44 S. Ct. 302, 68 L. Ed. 646); Gonsalves *v.* Morse Dry Dock & Repair Co., 266 U. S. 171 (45 S. Ct. 39, 69 L. Ed. 288); and Robins Dry Dock & Repair Co. *v.* Dahl, 266 U. S. 449, 457 (45 S. Ct. 157, 69 L. Ed. 372)."

In the *Kierejewski* case, the employee, a master boiler maker, was injured while working from a float alongside a scow, making repairs on the scow. The *Dawson* case included the instances of stevedores working only on board ship, and workmen engaged at maritime work under maritime contract upon a vessel moored at a dock. Gonsalves was working on board a steamer in a floating dock, aiding in the repair of the shell plates, Dahl was doing repair work on a steamer. In the latter case, the court said:

> "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469 476 (42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008), but had direct relation to navigation and commerce, as in Great Lakes Dredge & Dock Co. *v.* Kierejewski, 261 U. S. 479 (43 S. Ct. 418, 67 L. Ed. 756). The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

Later rulings of the court are that the Louisiana Compensation Law (Act No. 244 of 1920) did not apply to an injury sustained by a helper to a boiler maker sent on board a steamer on the Mississippi river to help lengthen a smokestack (*Messel* v. *Foundation Co.*, 274 U. S. 427, 47 S. Ct. 695, 71 L. Ed. 1135), nor to the death of a longshoreman while unloading a vessel. *Smith & Son* v. *Taylor* (No. 186, October term, 1927) 48 S. Ct. 228.

And in *Baizley Iron Works & Ocean Accident & Guarantee Corp. Ltd.* v. *Spann,* 281 U. S. 222-232, the injured was painting angle irons on a ship on the Delaware River and suffered injury by reason of sparks from a torch used by a fellow employee. The employee's work was described as a blacksmith's helper. The SS. Baldhill, upon which he was working, was being repaired and the repair included

the painting of the engine room and repairs to the floor of the same; the ship being tied to the pier in the Delaware River. The lower court held that the injured was doing work of a nature which had no direct relation to navigation or commerce, and the situation was, therefore, controlled by the holding in the *Grant-Smith Porter* case. The U. S. Supreme Court, in reversing, commented upon the *Grant-Smith Porter* case as follows:

> "Claimant when injured, was working upon an incompleted vessel, a thing not yet placed into navigation and which had not become an instrumentality of commerce."

See also *Parker* v. *Motor Body Sales*, 314 U. S. 244, hereinafter referred to under Point II of the Argument.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Honorable Court hereinbefore referred to and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

Point II

The rights and liabilities of the respective parties were in the purview of the Longshoremen's & Harborworkers' Act, 33 U. S. C. A., 901 et seq.

See excerpt of N. J. Court of Errors and Appeals Decision under Point I of the Argument.

See cases and authority cited under Point I of the Argument.

Section 903 of the Longshoremen's & Harborworkers' Act reads as follows:

> "3. Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death

results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of * * *"

The United States Employees Compensation Commission under the Longshoremen's Act has set forth its views as to the interpretation of Section 903 of that Act, after a consideration of the Federal decisions relating to that subject matter. Herewith follows its interpretation of this Section (Commission's opinion No. 30, page 45 at 46-47)

"It is to be noticed that section 3 (a) does not relate to (1) the question whether or not a State Workmen's Compensation Law has provided for compensating an injury to an employee of a particular class, nor (2) the question whether or not an injury is being compensated by payment from a State fund or by an insurance carrier or employer under a State law, nor (3) to the interpretation concerning coverage made by a State commission or other public authority. In other words, section 3 (a) has the same application to a State having no Workmen's Compensation Law, as it does to States having such laws and with the same meaning."

"Section 3 (a) relates to the constitutional authority of State Legislatures and the Congress of the United States. When the section used the word 'validity' it has reference to constitutional authority. When an injury occurs to an employee actually in maritime employment and at the time upon the navigable waters of the United States, the compensation for that injury is a subject committed to the exclusive jurisdiction of Congress by the Federal Constitution as was decided by the United States Supreme Court in the Dawson case hereinabove referred to. It is clear that Congress has exercised its exclusive admiralty and maritime jurisdiction by the enactment of

the Longshoremen's and Harbor Workers' Compensation Act and an injury so incurred is to be compensated under that act and not otherwise. * * *"

"The Federal Constitution, of course, applies to and governs the legislation of all States, and it is now evident that State Workmen's Compensation Laws are not applicable to such maritime injuries as come within the Longshoremen's Act. * * *"

"The history of legislation by Congress in 1917, 1922 and 1927, and the decisions of the United States Supreme Court during a large part of the same period, clearly indicates that no State law is valid that attempts to compensate for disability or death occurring in maritime employment on the navigable waters. * * *"

In *Parker* v. *Motor Boat Sales,* 314 U. S. 244, the Court said of the above quoted Act:

"The purpose of this chapter (act) was to provide for federal compensation in the area which specific decisions of the United States Supreme Court placed beyond the reach of the States, and the proviso in this section (903) making compensation payable only if recovery may not validly be provided by State law cannot be read in a manner that would defeat that purpose."

"Under the provision of subsection (a), (903) making compensation payable only if recovery may not validly be provided by State law, the field in which a State may not validly provide for compensation must be taken for the purpose of this chapter (Act), as the same field which specific decisions of the United States Supreme Court excluded from State compensation laws."

The above case was later confirmed in *Davis* v. *Department of Labor and Industries of Washington,* 317 U. S. 249, 63 S. Ct. 225.

A case of much interest following the *Davis* case is that of *De Bardeleben Coal, et al.,* v. *Hendersen* (Cir. Ct. of Appeals, 5th Ct., 142 F. (2d) 481), wherein recovery was allowed in the drowning of a member of a shore gang whose duty it was to maintain a fleet of barges and, while so doing, fell into the Mississippi River.

In the issue as to whether the Federal law should apply to the exclusion of the State law, the Court said, citing the *Continental Casualty Company* v. *Lawson* (64 F. (2d) 802):

> "The question of whether jurisdiction over a maritime tort could be asserted under the compensation laws of the States, or existed exclusively in admiralty was an important one, when the decisions were rendered in the Rhode (Grant Smith-Porter Ship Company *v.* Rhode, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008), the Brand (Millers Indemnity Underwriters *v.* Brand, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed., 470), and other similar cases referred to in Colonna's Shipyard Company *v.* Lowe, 22 F. 2nd 843, but since the passage of this Act, the importance of that question has largely disappeared. The elaborate provisions of the Act, viewed in the light of prior congressional legislation as interpreted by the Supreme Court leaves no room for doubt as it appears, to the fullest extent all the power and jurisdiction it had over the subject matter. The liability of an employer who makes provisions to secure compensation to his employees is exclusive of all other liability that might be asserted by them against him. State compensation laws and this compensation law of Congress are mutually exclusive of each other."

The Court went on further to state, in upholding the Federal jurisdiction:

> "The Parker case, supra, substantially adopts this view and such aberrations from it as the quasi legislative decision in the Davis case, seems to present, but

only in appearance, another one of those hard cases which make bad law. State jurisdiction was upheld therefor announced reasons having more legislative than judicial force, and not because of any purpose to adopt a rule contrary to that which this Court had announced in the Lawson case and the Parker case, pointing out that it is not at all necessary now to redetermine the correctness vel non of the Jensen case or of any of the brood hatched from it, which teetering and wavering on the line the Jensen case had drawn between State and Federal jurisdiction, drew it now on this and now on the other, side as hard cases piled up to make bad law worse. It is sufficient to say that Congress intended the compensation act to have a coverage coextensive with the limits of its authority and that the provision, 'If recovery * * * may not validly be provided by State law,' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy, but only to save the Act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. Having in mind the confused and confusing mass of quasi legislative decisions which, as such decisions always tend to do, had rendered the law almost helplessly uncertain, this provision was inserted to avoid, not to provide, a new basis for further judicial trimming. In the application of the Act, therefore the broadest ground it permits should be taken. No ground should be yielded to State jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the 'local concern' doctrine to save employees injured on navigable waters and otherwise remediless, the remedies State Compensation Law afforded them. In short, the Federal Compensation Law now in effect, the judicial tergiversations which went on before its passage no longer have point. This is what we held in the Lawson case, what the

Supreme Court held in the Parker case, supra. We adhere to that holding." (Italics mine.)

See also *U. S. Casualty Co.* v. *Taylor,* 64 F. (2d) 521, reversing 60 F. (2d) 165, Certiorari denied, 54 S. Ct. 562, 90 U. S. 639; *Royal Indemnity Co.* v. *Puerto Rico Cement Corp.,* 142 F. (2d) 237.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Honorable Court hereinbefore referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

Conclusion

Petitioner respectfully submits that the questions presented by the foregoing petition show a well defined conflict exists, between the decision of the Court of Errors and Appeals of New Jersey and the decisions of this Honorable Court and that there are involved important questions of constitutional and federal law which have not been but should be decided by this Court, and that these questions should be reviewed by this Court.

Respectfully submitted,

WALTER H. JONES,
Of Counsel with and Attorney
of Petitioner-Appellant.

OPPOSITION

BRIEF

FILE COPY

Supreme Court of the United States

October Term, 1946 — No. 458

TODD SHIPYARD CORPORATION,
Petitioner, Appellant Below,

vs.

HARVEY DE GRAW,
Respondent, Appellee Below.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CASES CITED

STATUTES CITED

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Respondent, Appellee Below.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The defense interposed to the claim is that respondent's sole remedy is under the Federal Harborworkers' and Longshoremen's Act (44 U. S. Stat. 1424, 33 U. S. C. A. 901, *et seq.*), and that the New Jersey Workmen's Compensation Bureau is, therefore, without jurisdiction. Petitioner's formal answer to the original claim petition as to this defense was quite indefinite, merely alleging that the accident was "probably" within the jurisdiction of the United States Harborworkers' and Longshoremen's Act (R. 11).

Respondent testified that he had been in petitioner's employ as a pipe-fitter for about a year and a half prior to the accident. The accident happened while he was

working aboard a vessel, the "Fred Morris", in the process of being rebuilt from a freighter into a naval attack ship. On previous occasions, respondent's work, at times, would be performed in petitioner's shop located on land in Hoboken, New Jersey (R. 31). At other times he would work on the docks (R. 31). The type of work performed while at the shop on land in Hoboken consisted in cutting and making up pipes (R. 31). He was not a member of any ship's crew (R. 31).

The "Fred Morris", at the time of the accident, was then in dry-dock, and, at that time, was in such a condition that it was not able to navigate (R. 37). It was being reconverted from a freighter into a naval attack ship. In describing in a very general way the work being done upon it, he said: "When the ship came in they tore it down. * * * They tore out the bulkheads. They tore out pipelines here and there all over the boat" (R. 34 and R. 35). The vessel had been withdrawn entirely from navigation (R. 38 and R. 39). The dismantling process alone required from two to three months (R. 48).

In detailing the circumstances surrounding the accident, respondent testified that he was in the act of pulling away from a bulkhead a two and one-half inch pipe, using a burner apparently for the purpose of softening the pipeline. While the heat was being applied to the pipe, and while respondent was pulling the pipe, the stanchion which was being used ripped off, causing him to be thrown on his back on to the deck (R. 41).

Michael A. Corbett, petitioner's sole witness, testified that he was employed by petitioner as superintendent, and was in full charge of the conversional repairs of various vessels for the Navy, Maritime Commission and private owners (R. 83). The "Fred Morris" was put under his charge "for complete conversion, changing it

over from a freighter to a navy transport" he said (R. 83). About two weeks prior to its arrival at the Todd Shipyards, he was notified by the War Shipping Administration that it would arrive in port on a certain day and would tie up at a certain pier in New York City Harbor (R. 87). The War Shipping Administration immediately placed certain preliminary orders with respondent (R. 87), and when the vessel arrived in New York, a survey of it was made (R. 38). This survey was made at Lykes Brothers Pier in New York City before it was placed in dry-dock at respondent's yards (R. 38).

The ship was brought into dry-dock on December 23, 1943, at which time War Shipping Administration representatives, United States Navy inspectors and the witness "went down, inspected the hull of the vessel to see if she was in a fit condition for conversion, and determined the amount of hull repairs that would be necessary to put her in the class of an attack ship. She was held in dry-dock until the necessary alterations had been made" (R. 90).

Corbett identified Plan No. 8571, which showed the changes that were required to be made, and which indicated the condition the reconverted vessel was to be in after all the work was completed (R. 90). Corbett said: "The ship came in as a freighter, and she was—the orders were given to send her out in condition to be made and act as, what we call, an A P attack transport for Pacific duty" (R. 91). A list of specifications which accompanied Plan No. 8571 was also identified by the witness (R. 91). These specifications were about thirty in number (R. 108).

The work of conversion was started on December 23, 1943, at petitioner's dry-dock, where it was continued until March 15 of the following year (R. 93). On the

latter date, the work, not having been yet completed, the boat was moved from petitioner's yard to the Navy Yard Annex, where work was further continued with petitioner's men continuing to do the work at the Navy Yard Annex up to April 27 (R. 93). The entire work consumed four months (R. 119).

Corbett testified that a great many changes were made to the vessel, among which were changes to the hull. Many things had to be taken out and replaced. Oil lines had to be changed to give the new vessel a capacity for greater cruising range (R. 111). New fuel lines and additional fuel tanks were installed to allow for a greater cruising range as well as to provide means of fueling smaller vessels that happened to be in convey (R. 111). Additional doublers and reinforcing plates were added to the hull (R. 111). The vessel, in Corbett's own words, "was entirely changed" (R. 112). "We put in living accommodations for a certain number of men" (R. 112). The appearance of the boat was changed. On a view of the vessel from afar, he said, "it would be different" (R. 112). The steering mechanism was taken apart to some extent (R. 115). He characterized the job as "a major conversion" (R. 118).

ARGUMENT

The decision of the New Jersey Court of Errors and Appeals is not in conflict with the decisions of this Honorable Court but in accord therewith.

It is noted that there are three important periods through which litigation of this type has passed. The first was the period preceding the enactment of the Federal Harborworkers' and Longshoremen's Act passed in 1927. The second followed the enactment and application of that statute, and the third commenced with the United States Supreme Court decision of *Davis* v. *Department of Labor and Industries,* 317 U. S. 249, 63 S. Ct. 225, decided in 1942. The law of the *Davis* case lends a new aspect to the question. While respondent urges that even had the *Davis* case not been decided, his right to compensation under the New Jersey Compensation Act would nevertheless have existed under the Federal authorities theretofore in effect, yet, in face of the *Davis* case, the uncertainty and confusion previously existing has been eliminated to a great extent and respondent's right to compensation under the state act is now even more clearly demonstrated.

Contracts to construct new ships are non-maritime. *Peoples Ferry Co.* v. *Beers,* 20 How. 393, 15 L. Ed. 961, and, therefore, claims for accidents occurring while constructing new ships are, therefore, necessarily within state compensation acts. It is submitted that the contract to convert the vessel in his case was so extensive as to amount to a rebuilding job, and, therefore, falls within the same rule. The Supreme Court, in the case at bar, expressly held that "the work was not in the nature of repairs but a rebuilding" (R. e). The Court

of Errors and Appeals also held it was not a repair job. However, it appears from the cases hereinafter cited that the question whether the matter falls within the principle of those concerning construction of new ships is not necessarily the exclusive determining factor, for in a case involving a conflict between a state compensation act and the federal act, other questions must be settled.

It appears from the decisions hereinafter cited that the cases concerning admiralty law as applied generally to contracts and torts are not dispositive of the issues raised in the case at bar, for in cases involving the question of the applicability of a state workmen's compensation law as against the applicability of the Federal Harborworkers' and Longshoremen's Act, the doctrine commonly referred to as the "local concern" doctrine has been evolved by the courts as the determining factor in its decision.

Not only is it necessary that inquiry be made as to the applicability of the "local concern" doctrine, but further inquiry must also be made to determine if the principle of the *Davis* case, *supra,* is applicable.

The principle of the *Davis* case is separate and apart from the "local concern" rule. Under the *Davis* case, the state compensation act applies in any case coming within its scope, even though the facts of the case do not bring it within the purview of the "local concern" rule. We shall hereinafter more fully consider the *Davis* case.

Thus, three inquiries are essential for determination of the question here involved, as follows: (a) was respondent engaged strictly in non-maritime employment? (b) assuming that question (a) is answered in the negative and that respondent was engaged in maritime employment, nevertheless was the employment such as to fall within the "local concern" rule? and (c) assuming

there is doubt as to whether or not respondent was engaged in maritime employment, and that his employment does not clearly fall within the "local concern" rule, nevertheless do the facts bring the case within the law of the *Davis* case, *supra*? If any one of these three inquiries is answered in the affirmative, the workmen's compensation bureau of the state has jurisdiction and the federal act does not apply. We submit that all three inquiries should be answered affirmatively as to respondent in the case at bar, although, as will be seen, an affirmative reply as to any one would be sufficient to invest the workmen's compensation bureau with jurisdiction under the state act.

It is noted from the opinion of the New Jersey Supreme Court in this case, that its decision was based upon a finding that "the work was not in the nature of repairs but a rebuilding", and that until the rebuilding had been completed, petitioner was not engaged in commerce or navigation (R. e). The Court of Errors and Appeals also so held. The Supreme Court adopted an additional reason for its conclusion, to wit, that the work consisted in converting a freighter into a naval vessel and held "a naval vessel is not engaged in commerce under any circumstances" (R. e), apparently relying upon the ruling in this respect in the case of *The George L. Harvey*, 273 Fed. 972.

The basic case is *Southern Pacific Co.* v. *Jensen*, 244 U. S. 207, 37 S. Ct. 529, 61 L. Ed. 1086, L. R. A. 1918 C, 451, decided in 1917, in which it was held that maritime jurisdiction was exclusive in a situation where a workman operating a truck in the unloading of a steamship moored to a pier was injured while on the gangway extending from the ship to the dock, because, said the court:

> "The work of a stevedore in which the deceased was enjoying is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction."

The effect of the *Jensen* case was to render inapplicable all state compensation acts with respect to maritime contracts, leaving the employee with whatever rights he might have had in admiralty.

An important exception to the doctrine of the *Jensen* case, *supra,* however, is later noted in *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008, decided in 1922 before the enactment of the Longshoremen's and Harborworkers' Act of 1927, where it was held that the Workmen's Compensation Law of Oregon was applicable to an injury sustained by the employee, Rohde, while on a ship, building a bulkhead in a vessel then under construction but practically completed, the vessel lying at a dock in navigable waters. The court there said:

> "The contract for constructing the Ahala was non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time had any direct relation to navigation or commerce. * * * The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the industrial accident fund (under the State compensation act), it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. *Union Fish Co.* v. *Erickson,* 248 U. S. 308 (39 S. Ct. 112, 63 L. Ed. 261). Under

> such circumstances, regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. * * *
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> "In *Western Fuel Co.* v. *Garcia, supra,* (257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210), we recently pointed out that, as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle."

The court, in the *Rohde* case, *supra,* distinguished the *Jensen* and other like cases thus:

> "In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

And the court further held that while "the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction, when lying on navigable waters within a state" (The Harborworkers' and Longshoremen's Act of 1927 not yet having been passed), yet in the circumstances stated, "the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist."

The court said further that the employment was a matter of contract between the parties, and held:

> "The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."

Thus, the mere fact that the accident happened on navigable waters is not conclusive, for in matters of this kind, viz.: contracts of employment and their incidents, it is the "nature of the transaction" and not the "locality" of the accident that controls.

In the *Rohde* case, the court found that if the action there were brought in tort, rather than under the compensation act, a suit in admiralty would have been the appropriate remedy, and notwithstanding such a finding, the court nevertheless found that the workmen's compensation act of Oregon was applicable. The court said:

> "Construing the first question (of those certified to the Court) as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, we answer, yes."

In *John Bazley Iron Works* v. *Span,* 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819, the court said that "what work has direct relation to navigation or commerce must of course be determined in view of the surrounding circumstances as cases may arise."

In *State Industrial Commission of New York* v. *Nordenholt Corporation,* 259 U. S. 263, 42 S. Ct. 473, 66 L.

Ed. 933, 25 A. L. R. 1013, decided 1922, the court referred to the *Rohde* case, *supra,* as follows:

> "The Oregon Workmen's Compensation Law prescribed an exclusive remedy and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occured on navigable waters and the cause was of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter."

In *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470, decided 1926, the doctrine of the *Rhode* case, *supra,* was applied to a maritime employment and the exception further clarified. The employee was a sea-diver, engaged in working off a barge anchored in navigable waters, removing the timbers of an abandoned set of ways, once used for launching ships. While the facts showed a maritime tort here too, both from a standpoint of locality, as well as the character of the work, the court held the Texas compensation law applicable, because:

> "The matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law."

In *Miller's Indemnity Underwriters* v. *Braud, supra,* the court referred to cases involving injuries received by employees while engaged in making only repairs to a vessel, and said:

> "We had occasion to consider matters which were not of mere local concern because of their special re-

lation to commerce and navigation, and held them beyond the regulatory power of the state, in *Great Lakes Dredge and Dock Co.* v. *Kierejewski,* 261 U. S. 479 (43 S. Ct. 418, 67 L. Ed. 756); *Washington* v. *Dawson & Co.,* 264 U. S. 219, (44 S. Ct. 302, 68 L. Ed. 646); *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 266 U. S. 171 (45 S. Ct. 39, 69 L. Ed. 288), and *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449, 457 (45 S. Ct. 157, 69 L. Ed. 372)."

In the *Kierejewski* case, *supra,* the employee, a master boiler maker, was injured while working from a float alongside a scow, making repairs on the scow. The *Dawson* case, *supra,* included the instances of stevedores working only on board ship, and workmen engaged at maritime work under maritime contract upon a vessel moored at a dock. In the *Gonsalves* case, *supra,* the employee was working on board a steamer in a floating dock aiding in the mere repair of the shell plates. In the *Dahl* case, *supra,* the employee was doing repair work on a steamer. In the latter case the court said:

> "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 476, but had direct relation to navigation and commerce as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479."

These above cases, with the exception of the *Dawson* case, were strictly "repair" cases. None of them involved building a new vessel or rebuilding or reconverting an old vessel into an entirely different one as in this case.

It is worthy of note that in the *Rohde* case, *supra,* the "Ahala" upon which the employee was injured had already been launched (257 U. S. at page 474), at the time

of the injury, and as stated in the opinion at 257 U. S. 474, "The vessel had been substantially completed but was not ready for delivery."

In *Alaska Packers Association* v. *Industrial Accident Commission,* 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656 (1927), a case also decided prior to the enactment of the Harborworkers' and Longshoremen's Act, a workman employed by a fishing and canning company as a seaman, fisherman and for general work in and about a cannery, was injured while standing upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock. The court held that the state act applied, and further held that even if the case was within admiralty jurisdiction, yet "when injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character" (citing *Grant-Smith Porter* v. *Rohde, supra,* and *Miller's Ind. Underwriters* v. *Braud, supra*).

From all the above cases, it is seen that the rule generally to be deduced prior to the enactment of the Federal Harborworkers' and Longshoremen's Act was that if an injury occurred on navigable waters, and in the performance of a maritime contract, recovery could not generally be had under a state workmen's compensation act. But if the contract, even though maritime in character, and even though it was such that a suit in admiralty would lie for tort at the same time for injury occurring while performing it, yet if the work that the employee was performing at the time of the accident was of merely local concern, *i.e.,* its performance had no direct effect upon navigation or commerce, and the application of the state law "would

not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations'' as stated in the *Rohde* case, *supra,* there recovery could be had under the state compensation act, the compensation act being broad enough to cover accidents whether of tortious origin or not.

It is manifest from the *Rohde* case that one of the important elements for consideration is whether or not a state compensation act exists. For if it does exist, even though the matter is maritime in character and would, in the absence of such compensation act, fall within the admiralty jurisdiction, yet if it is of local concern and does not directly affect navigation or prejudice the uniformity of maritime law, the state act will operate.

What then is the nature of the transaction in which respondent was engaged, viewed from the question as to whether or not his work was local, *i. e.,* whether it had or had not any direct relation to navigation? We submit that respondent's work was only indirectly related to navigation. The ship that he was working on was no more connected with navigation than a ship being built anew. It had been entirely withdrawn from navigation for a reconversion job which was to require four months. We submit that it is entirely illogical to characterize this job as a mere repair job and to place it in that class, as respondent urges. This ship was being converted entirely from one type of vessel (a commercial freighter) to another (a naval attack ship). While it was being so converted, it was, to all intents and purposes, in the same category as a ship in the course of construction. It had to be stripped and refitted. ''When the ship came in they tore it down.'' ''They tore out the bulkheads, they

tore out pipelines here and there, all over the boat" (R. 34 and R. 35). The tearing down process alone required two to three months (R. 48). The job was of such magnitude that thirty plans and specifications were required. The ship had to be placed in dry-dock and the size of the job can also be gathered from the fact that it required more than four months to complete it, *i. e.,* from December 29, 1943 to April 27, 1944 (R. 93 and R. 94). At the time of petitioner's accident on January 20, 1944, there was still more than three months of work ahead. Mr. Corbett, for respondent, called it a "complete conversion" (R. 83), and also "a major conversion" (R. 118). Among the many changes made were changes to the hull. A number of things had to be taken out and replaced, oil lines had to be changed to give the reconverted vessel a greater cruising range, additional oil tanks were installed, and additional doublers with reinforcing plates were put on the hull (R. 111). Mr. Corbett also said "the vessel was entirely changed. We put in living accommodations for a certain number of men" (R. 112). Lines and other apparatus used in the work were attached to the ship and extended on to the dock. The Common Pleas made detailed findings of the character and extent of the work. In short, it was to be changed from a commercial vessel to a war vessel, a naval attack ship, with all that that implies, guns, reinforced hull, accommodations for servicemen, etc. The New Jersey Court of Errors and Appeals said: "This work had no direct relation either to navigation or commerce."

Petitioner places its main reliance upon the fact that the work was being done on a vessel that had already been once completed and, therefore, the work must, of necessity, be considered maritime. If it were true that the only criterion is whether the vessel was already a

completed object or not, then we inquire why it was that the Supreme Court found it necessary to discuss the "local concern" rule as it did in the cases above mentioned, which involved accidents occurring on ships not yet completed. Is it not manifest that if the whole case depended alone upon the question as to whether the employee was working on a completed ship or not, as petitioner argues, the above-cited cases would have been decided upon that point alone and without going into the "local concern" rule?

We submit that the fact that the court did not rest its decisions in these cases upon the mere fact that the ship was in the course of construction alone shows that this type of case, as at bar, is in a class different than suits between the ship-builder and owner on the contract itself, as in *Peoples Ferry Co.* v. *Beers,* 20 How. 393, 15 L. Ed. 961 and others cited on page 15 of petitioner's brief, and that the important question here is whether or not the work that the employee was doing was of "local concern" and not merely whether he was working on a completed ship or not.

Petitioner cites *New Bedford Dry Dock Co.* v. *Purdy,* 258 U. S. 96, 42 Sup. Ct. 243, 66 Law Ed. 482, on page 15-16 of its brief a case involving the reconversion of a vessel. The *Purdy* case involved only the application of the Federal Lien Act of 1910, providing for a lien for repairs to vessels. The dispute was between the ship repairman and the owner and did not involve a conflict between a state compensation act and the federal act. It was held that a lien arose under the Act because the contract was one for repairs within the intendment of that statute. This, however, is entirely different from a case in which the "local concern" rule and the "twilight zone" doctrine applies, as at bar. There was no room

in the *Purdy* case for the application of either of these rules. Many of the cases in which it was held that the state compensation act applied, show that the employee was doing work upon a contract made between his employer and a third person, which would, in case of suit on the contract itself between the parties thereto have been cognizable in admiralty. Several of the cases heretofore cited show this to be so, for example, *Miller's Indemnity Underwriters* v. *Braud, supra,* and *Sultan Railway & Timber Co.* v. *Dept. of Labor, etc., supra.* In the latter case the court expressly held that "where the employment, *although maritime in character,* pertains to local matters", a claim for compensation may properly be brought under the state act. It is apparent that if these cases were decided merely upon a determination as to whether the contract between the shipbuilder and owner was maritime, there would be no need whatever for even suggesting the "local concern" rule. It is only because the contract is, in fact, maritime, that the court finds it necessary to resort to the "local concern" rule in order to find jurisdiction in the states under the state acts. (Italics supplied.)

The *Purdy* case is inapplicable for the further reason that it involved the application of an act creating a lien upon vessels, intended to protect repairmen and material men for their charges, and because of this purpose, was given a broad construction in favor of such persons. The court expressly held in that case that "reasonable doubts concerning the latter should be resolved in favor of the admiralty jurisdiction", and that the word, "repairs", "*as used in the statute,* has a broad meaning", and that it was limiting its broad definition to "cases like the instant one." (Italics supplied.) In the case at bar, however, the rule is just the contrary where a state tribunal has

already allowed compensation, as here, for under the *Davis* case, doubts are resolved in favor of the state's action. And the court said further in the *Purdy* case, "It is not always easy to determine what constitutes repairs as opposed to original construction."

That the word "repairs", as used in the Federal Lien Act of 1910, is given a broad construction peculiar to that act, is further shown by *"The Harvard"*, 270 Fed. 668.

In the report of the *Purdy* case found in 66 Law. Ed. 482, there is an extensive footnote beginning at page 484, reading as follows:

> "But it has been held that a contract to convert a scow into a dredge is a contract for construction, and not for repairs, and is not a maritime contract. *McMaster* v. *One Dredge,* 95 Fed. 832. The court, quoting from *The Paradox,* 61 Fed. 860, in which a contract for the machinery of a vessel was held not enforceable in admiralty where the machinery was supplied for the completion of the construction of the vessel said 'When the vessel is completed for the purpose intended, then the vessel is "built", and not till then, whether it be a steamer, a sailing vessel, a barge, a scow, or a mere float, designed to support and transport a bathhouse; and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business or navigation intended, is a part of the "building" of the vessel.' Tried by this criterion, the work and labor and materials furnished in this case were for the building of the vessel. It can make no difference whether the scow was already built, and had theretofore been used for another purpose, or whether it was merely constructed for the purposes of a dredge. The purpose of this contract was to build this scow into a dredge. (Note: In the case at bar, the purpose was to build a

freighter into a Navy A. P. attack ship.) As a mere wood barge, the things done were not required. It was only for the purposes of a dredge, which, in its relation with the scow, was a new thing, that the work and labor in this case were performed and the materials furnished, and this is a building of the dredge, within the rule adopted in the cases cited. * * * The contract, therefore, is not a maritime contract. * * *

"And the work necessary to alter a lake steamer so as to fit it for ocean navigation, the principal part of which was the lengthening of the vessel, is more in the nature of reconstruction than repairs, and no maritime lien exists under the Act of 1910. *The Susquehanna,* 267 Fed. 811.

"And where one purchased an old hull which had been built of timbers of a dry dock, a contract for work and materials for converting it into a suction dredge is one for construction and not for repairs, within the jurisdiction of admiralty, so that the provisions of the Act of 1910 do not apply. *The Dredge A.,* 217 Fed. 617.

"And where a barge was dismantled and a new hull built, though the old cabin and machinery were used, it was held that there were no repairs, but the completed vessel was held to be a new boat, so that admiralty was without jurisdiction to declare a lien on the hull for the work on her. *Hartuppe* v. *The Coal Bluff No. 2,* Fed. Cas. No. 6172.

"And a contract with a shipwright to assist in the building of a new vessel on which some of the parts of an old boat are used, including the boilers, pilot house, and roof, is not a maritime contract, over which admiralty has jurisdiction. *Smith* v. *The Royal George,* 1 Woods, 290 Fed. Cas. No. 13, 102.

"And the work performed and material furnished in converting a war vessel into a fishing boat, including the removal of cabins, cutting hatches, building a

railing and lining, have been held to be in the nature of construction and not furnished for a maritime service, so that claims based thereon were not within the jurisdiction of admiralty. *The George L. Harvey,* 273 Fed. 972. The court stated that the vessel, upon its original launching, was foreign to commerce, and not subject to admiralty jurisdiction, that before she would be subject thereto she must be divested of the attributes of war, and clothed with the conveniences and necessities of commerce and trade, and that not until she was suitably fitted for commerce and trade was she constructed, and not until the necessary labor and materials were supplied and furnished was the vessel qualified to enter into the service of navigation and trade."

It is seen from the case of "*The George L. Harvey*", *supra,* that vessels of war are in a separate class and not subject to admiralty jurisdiction. The case at bar involved the conversion of a freighter into a war vessel. The New Jersey Supreme Court in the case at bar also recognized this principle holding, "A naval vessel is not engaged in commerce under any circumstances" (R. e).

In 1927 the Federal Longshoremen's and Harborworkers' Compensation Act was passed (44 Stat. 1424, 33 U. S. C. A. 901 *et seq.*).

Section 2 (d) of the act provides that "the term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry-dock)"; and Section 3 (2) provides that "compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occur-

ring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

We are thus particularly concerned here with so much of this limitation as restricts recovery to those instances where recovery through workmen's compensation proceedings may not validly be provided by state law. The vital question is whether in these circumstances a state law could validly provide for compensation for petitioner.

The rule of the *Rohde* case, *supra,* as again summarized in *Sultan Railway & Timber Co.* v. *Dept. of Labor and Industries,* 277 U. S. 135, 137, 48 S. Ct. 505, 506, 72 L. Ed. 820, decided 1928, after the enactment of the federal act is as follows:

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 66 L. Ed. 321, 25 A. L. R. 1006, 42 Sup. Ct. 157; *Miller's Indemnity Underwriter's* v. *Braud,* 270 U. S. 59, 70 L. Ed. 470, 46 Sup. Ct. 194; *Alaska Packers Assoc.* v. *Industrial Accident Commission,* 276 U. S. 467."

That the question of the applicability of a state workmen's act does not necessarily depend upon whether the employee is engaged in working on a completed vessel or not is also indicated by the case of *Davis* v. *Department of Labor and Industries of the State of Washing-*

ton, 317 U. S. 249, 63 S. Ct. 225, hereinabove cited and hereinafter more specifically referred to, where a steel worker was injured while afloat on a barge and engaged in dismantling a bridge over a navigable river and long since completed. In the case at bar, petitioner was, at the time of his accident, employed in disengaging some pipe from a bulkhead. In the *Davis* case, torches were being used while in the case at bar a burner was used. In the *Davis* case, according to the facts as reported in more detail in State of Washington reports, the dismantled bridge was to be replaced by another bridge (see *Davis* v. *Department of Labor and Industries,* 121 Pac. 2d 365), and although the state court held that its own state act could not apply since the accident was maritime, the United States Supreme Court ruled otherwise and held that it did apply.

If petitioner's argument that the test is whether the workman is engaged in work on a completed ship or not, without regard to any other factors, then one engaged in dismantling a ship for the purpose of junking it should come under the federal act. But such certainly cannot be the law for the purpose, in such case, is to remove the ship from navigation, and not in furtherance of it.

In *Miller & Indemnity Underwriters* v. *Braud, supra,* the United States Supreme Court held that one employed as a diver who had submerged himself from a floating barge, anchored in the navigable Sabine River, thirty-five feet from the bank for the purpose of sawing off the timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation, was not under the federal act but under the state act. Although the court expressly found that the "record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend

save for the provisions of the State Compensation Act", yet since there did exist a state compensation act, and "the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law" the state and not the federal act applies. The *Braud* case also indicates that the fact that the injury occurred while working on an already completed maritime object does not necessarily bring the case under the federal act.

In *Jones* v. *International Merchant Marine Co.*, 252 App. Div. 347, 300 N. Y. Supp. 238, affirmed 277 N. Y. 640, 14 N. E. Rep. 2nd 198, it was held that an accident in which a watchman was killed in a fall through an open hatch on a ship that had been out of service for two years on navigable waters and "just temporarily laid up until they had service for her" and was used as a mother ship, was not maritime and the state compensation act applied. The case at bar bears a close analogy for here, too, the ship was removed from service when the accident occurred.

In *United States Casualty Co.* v. *Taylor* (C. C. A.), 64 Fed. (2d) 521, certiorari denied, 290 U. S. 639, 54 S. Ct. 56, 78 L. Ed. 555, the employee was engaged in drilling holes for the placing of lights on the mast of a light ship, which vessel the employer was building; she had been launched and was then afloat at a dock on the Cooper River, and was 96 or 97 per cent complete. The court said that the work of claimant was not maritime; that the Longshoremen's Act is obviously restricted to persons engaged in maritime employment and that it deals exclusively with compensation as to injuries occurring on the navigable waters of the United States. The court reversed the lower court's decree awarding compensation

under the Longshoremen's Act, and held that the case was one wherein the State of South Carolina might validly provide for workmen's compensation, and therefore, fell within Section 3(2) of the Harborworkers' and Longshoremen's Act hereinabove quoted.

On pages 9 and 22 of its brief, petitioner cites *Spencer-Kellogg & Sons, Inc.* v. *Hicks, et al.*, 285 U. S. 502, 515, and argues that it holds that the New Jersey Compensation Act cannot be a method of recovery where admiralty jurisdiction exists. The distinction between that case and the one at bar is that in the *Spencer-Kellogg* case there was no room for the application of the "local concern" rule, or the rule of the *Davis* case, the case being clearly within admiralty jurisdiction alone. The *Spencer-Kellogg* case was decided before the *Davis* case.

In *Davis* v. *Department of Labor and Industries of the State of Washington*, 317 U. S. 249, 63 S. Ct. 225, hereinbefore cited, the Supreme Court reversed the Supreme Court of the State of Washington, which had held there was no protection under its own state compensation act. The Supreme Court, in deciding the case, established a new solution to the old question by giving a new effect to awards of lower administrative bodies, state or federal, once made in a case falling within what it termed the "twilight zone", in the following passages from the opinion (pp. 256, 257, 258 of 317 U. S., or p. 229 of 63 S. Ct.):

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the

decedent who are, as a matter of actual administration, in fact protected under the state compensation act.

"Faced with this factual problem, we must give great—indeed presumptive—weight to the conclusion of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U. S. C. Sec. 920, 33 U. S. C. A. Sec. 920, which provides that in proceedings under that act, jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commission's findings in *Parker* v. *Motor Boat Sales,* supra (p. 314 U. S. 224).

"In the instant case, we do not enjoy the benefit of federal administrative findings and must, therefore, look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state. The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there, we have relied *heavily* on the presumption of constitutionality in favor of the state statutes. *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 188, 191, 58 S. Ct. 510, 515, 517, 82 L. Ed. 734."

While we contend, for the reasons heretofore given, that respondent's case is under the state act under the law as declared even prior to the *Davis* case, yet if it should be found that the case falls only within the "twilight zone", the federal act will still not apply and the state act will. Respondent, in such case, would come within the state act because, as the *Davis* case holds, he is one who is "as a matter of actual administration, in fact protected under the state compensation act." That respondent has already received protection by "actual administration" under the state act is made manifest by the fact that the New Jersey Workmen's Compensation Bureau has found in his favor.

The court further said in the *Davis* case:

> "Giving the full weight to the presumption, and resolving all doubts in favor of the act, we hold that the Constitution is no obstacle to the petitioner's recovery."

The court, in the *Davis* case, reviewed the uncertainty of the law as it existed prior to the enactment of the Longshoremen's and Harborworkers' Act on the question, stating:

> "State legislation was declared to be invalid only when it 'works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.' When a state could, and when it could not, grant protection under a compensation act was left as a perplexing problem, for it was held 'difficult, if not impossible', to define this boundary with exactness."

With respect to the effect of the Longshoremen's and Harborworkers' Act, the court said:

> "Harborworkers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by the federal act, but employees such as decedent here, occupy that shadowy area within which, at some undefined and indefinable point, state laws can validly provide compensation. This court has been unable to give any guiding definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of surrounding circumstances as cases arise.' *Bazley Iron Works* v. *Spain,* 281 U. S. 222, 230. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited in behalf of and in opposition to recovery here."

The *Davis* case thus was intended to declare a new rule which would avoid the uncertainties of the law as it existed prior thereto. It establishes a new doctrine, viz., that recovery under either the state or federal act is to be sustained if the case is thought to be a close one. The law is thus established that an employee in a "twilight zone" (where it is doubtful whether the federal or a state act applies) can recover under either act and where the state has once acted by allowing compensation to a workman as it has here, its action will be upheld and "will be rejected only in cases of apparent error."

Now that the New Jersey Workmen's Compensation Bureau has awarded compensation by formal proceedings, and its action affirmed by three successive higher tribunals, it, therefore, appears that respondent "as a matter of actual administration (is) in fact protected under the state compensation act", as the *Davis* case provides, the remaining question before the court is whether the facts of the case bring it into, at least, the "twilight

zone." If so, the action of the courts below should be upheld.

As the law now stands under the *Davis* case, it is not necessary that the matter be of local concern, as was the rule theretofore. All that need appear today under that decision is that the employment falls within the "twilight zone" and that the state authorities have already taken action by allowing compensation.

That petitioner apparently admits that the case is at least in the doubtful class is indicated by its answer to question No. 39 of the Answer to the Claim Petition, in which it merely says that the case is "probably" within the Harborworkers' and Longshoremen's Act (R. 11).

CONCLUSION

Respondent respectfully submits that the cases herein cited show that the decision of the New Jersey Court of Errors and Appeals is in accord with the applicable decisions of this Honorable Court and that the petition for certiorari should be denied.

Respectfully submitted,

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